

NOT GOVERNMENT POLICY

2016

Property Law Review
Lot entitlements under the
*Body Corporate and Community
Management Act 1997* –
Final Recommendations

Commercial and Property Law
Research Centre
QUT Law

Preface

The Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) was established in 2013. The Centre is a specialist network of researchers with a vision of reforming legal and regulatory frameworks in the commercial and property law sector through high impact applied research.

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1. Lot Entitlement Recommendations

1.1. Executive summary

The history of lot entitlements in Queensland is complex and there is no perfect solution that will please all stakeholders. Behind the history of lot entitlement adjustments and reversions, the underlying issue has been the allocation of expenses within community titles schemes.

In order to create greater certainty for stakeholders, greater flexibility for developers and increased transparency for purchasers and lot owners, the Commercial and Property Law Research Centre recommends changes to the current provisions for allocating expenses within community titles schemes.

The allocation of expenses in a community titles scheme should reflect both the cost burden that each lot creates on the expenses of the body corporate and the benefit that each lot receives from the expenditure of the body corporate. Expenses should be allocated directly, rather than indirectly, through contribution schedule lot entitlements.

Particular expenses of a body corporate benefit all lots. Where appropriate, these expenses should be shared equally. Where inappropriate to share these expenses equally, they should be shared on the basis of the interest schedule lot entitlement.

Other expenses of a body corporate benefit some, but not all, lots. Where appropriate, these expenses should be shared equally among the lots that benefit from the expense. Where inappropriate to share these expenses equally, they should be shared among the lots that benefit from the expense on the basis of the interest schedule lot entitlement.

1.2. The Recommendations

NUMBER		RECOMMENDATION
A NEW WAY OF ALLOCATING EXPENSES		
1		The single figure (currently the contribution schedule lot entitlement) used to allocate expenses within a community titles schemes is incapable of adequately differentiating appropriate contributions for lots in modern schemes.
1.1		It is recommended that contribution schedule lot entitlements should not be used to determine the allocation of expenses. For new schemes, a contribution schedule should not be required.
1.2		It is recommended that expenses of the body corporate for a community titles scheme should be allocated into one of three expense categories as set out in Recommendations 2-4 below.
CATEGORY 1 EXPENSES – SHARED EQUALLY		
2		Most expenses of a body corporate for a community titles scheme benefit all lots equally. These expenses will usually be related to the administration of the scheme, cleaning or regular (recurrent) maintenance of the common property and body corporate assets, and payments to service contractors.

NUMBER	RECOMMENDATION
2.1	It is recommended that expenses related to administration of the scheme, cleaning or other regular recurrent maintenance of common property and body corporate assets, and payments to service contractors should be shared among all lots equally as category 1 expenses .
2.2	It is recommended that the Regulation Modules provide examples of typical category 1 expenses for a community titles scheme.
2.3	It is recommended that expenses of the body corporate for a community titles scheme that are not within either category 2 or category 3 should also be treated as category 1 expenses.
CATEGORY 2 EXPENSES – SHARED ON INTEREST SCHEDULE	
3	Some expenses of a body corporate for a community titles scheme benefit all lots differently, depending upon the location, size or nature of the lot. These expenses will usually be of a capital or non-recurrent nature and relate to the repair and replacement of common property or body corporate assets.
3.1	It is recommended expenses of a capital or non-recurrent nature (including insurance) should be shared among all lots on the basis of their interest schedule lot entitlement as category 2 expenses .
3.2	It is recommended that the Regulation Modules provide examples of typical category 2 expenses for a community titles scheme.
3.3	It is recommended that the Regulation Modules require the body corporate to maintain a register listing the category 2 expenses for the scheme.
3.4	It is recommended that the category 2 expenses for a scheme be listed in the body corporate information certificate provided to interested persons by the body corporate.
CATEGORY 3 EXPENSES – BENEFITING SOME BUT NOT ALL LOTS	
4	Some expenses of a body corporate for a community titles scheme benefit some, but not all, lots. These expenses are generally capital in nature or relate to the maintenance, repair or replacement of capital items such as particular common property (including utility infrastructure), particular body corporate assets or a particular service provided by the body corporate to certain lots.
4.1	It is recommended that expenses that benefit only some lots should be shared either equally or on the basis of the interest schedule lot entitlement, but only among the lots that receive some benefit from the relevant expense as category 3 expenses .
4.2	It is recommended that category 3 expenses are allocated to particular lots through a group use by-law as set out in Recommendation 5 below.
4.3	It is recommended that the Regulation Modules require the body corporate to maintain a register listing the category 3 expenses for the scheme.
4.4	It is recommended that the category 3 expenses for a scheme be listed in the body corporate information certificate provided to interested persons by the body corporate.

NUMBER	RECOMMENDATION
GROUP USE BY-LAWS	
5	If accepted, Recommendation 4 will allow an expense that relates to particular common property, body corporate assets or a particular service provided by the body corporate to some, but not all, lots to be allocated to the group of lots that benefit from the expense.
5.1	It is recommended that the group of lots that receive some benefit from a category 3 expense should collectively be responsible for the maintenance, repair and replacement of the relevant asset or property, or the cost of the service.
5.2	It is recommended that the obligation to contribute to a category 3 expense should be formalised in a group use by-law which will define the relevant asset, property or service and the lots that benefit and are obligated to contribute to the cost of meeting the expense.
5.3	It is recommended that the group use by-law express whether the benefiting lots will contribute to the category 3 expense equally or on the basis of the lot's interest schedule lot entitlement (as appropriate or as specified in the legislation).
POLLS AND SPECIAL RESOLUTIONS	
6	<p>If accepted, Recommendation 1 will remove the need for a contribution schedule lot entitlement for lots in new schemes. This will require consequential amendment to the way the BCCM Act deals with polls and with counting of votes for a motion to be decided by a special resolution.</p> <p>The Procedural Paper has asked for public submissions on whether there are any reasons to retain the ability to call for a poll on a motion to be decided by an ordinary resolution at a general meeting.</p>
6.1	It is recommended that, depending on the responses to the question in the Procedural Paper, the use of polls be prohibited altogether or, if retained, that polls are determined in accordance with the interest schedule lot entitlements.
6.2	It is recommended that a motion to be decided by special resolution at a general meeting of a body corporate should require at least two-thirds of the votes cast are in favour of the motion and that the votes counted against the motion are not more than 25% of the number of lots included in the scheme.
UTILITY SERVICE PROVIDED BY A UTILITY SERVICE PROVIDER	
7	If accepted, Recommendation 1 will remove the need for a contribution schedule lot entitlement for new schemes. This will require consequential amendment to the liability of a lot owner to a utility service provider for a utility service that is not individually metered to each lot.

NUMBER	RECOMMENDATION
7.1	<p>It is recommended that where:</p> <ul style="list-style-type: none"> • a utility service provider supplies a utility service to each lot in the scheme and the common property; and • there is no practical way available to the utility service provider to measure the extent to which the utility service is supplied to each lot and the common property; and • the utility service is charged according to usage and not on the basis of land value, <p>then each lot owner should be liable to the utility service provider for an equal share of the total amount payable for the supply of the utility service.</p>
	<p>It is recommended that there be consultation with utility service providers to identify possible changes to current billing practices in these situations so that the billing process can more closely approximate the actual benefit received by each lot in terms of the supply of the utility service and the burden that each lot creates in terms of the total amount payable for the supply of that service.</p>
THE INTEREST SCHEDULE	
8	<p>If accepted, Recommendations 3 to 5 will place a greater emphasis on the interest schedule lot entitlement as a means of allocating expenses in a community titles scheme.</p>
8.1	<p>It is recommended that the interest schedule should be set based on the relative market value determined by a valuation by a registered valuer as at the date the scheme is established.</p>
8.2	<p>It is recommended that the valuation used by the developer to allocate interest schedule lot entitlements to each lot in the scheme should be included in the documents handed to the body corporate at the first AGM.</p>
8.3	<p>It is recommended that the body corporate retain this information in its records.</p>
OBLIGATION TO EXERCISE REASONABLE SKILL, CARE AND DILIGENCE	
9	<p>Under the BCCM Act, developers are responsible for allocating expenses and setting the schedule of lot entitlements in new schemes. This is because developers are the best placed to allocate expenses and they have the flexibility to allocate expenses within the guidelines set by the legislation. However, there is a perception that developers may not always allocate expenses with the best interest of the body corporate in mind.</p>
9.1	<p>It is recommended that an obligation should be imposed on developers to exercise reasonable skill, care and diligence and to act in the best interest of the body corporate when allocating expenses into the expense categories and when setting interest schedule lot entitlements.</p>
9.2	<p>It is recommended that failure to discharge this obligation could result in a civil penalty.</p>

NUMBER	RECOMMENDATION
ADJUSTING THE INTEREST SCHEDULE	
10	The BCCM Act currently allows a lot owner to apply to the Queensland Civil and Administrative Tribunal (QCAT) or a specialist adjudicator to adjust the interest schedule lot entitlements.
10.1	It is recommended that, to the extent the interest schedule does not reflect the relative market value of the lots in the scheme as at the date the scheme is established, this right is retained for lot owners in new schemes.
11	<p>The BCCM Act currently provides that the interest schedule may be adjusted in a few limited circumstances. These are:</p> <ul style="list-style-type: none"> • If necessary, following a formal acquisition of part of scheme land; • By a written agreement between two or more owners to reallocate their lot entitlements amongst themselves; • Following the amalgamation of two or more lots into one lot (existing lot entitlements are added together); or • Following the subdivision of one lot into two or more lots (existing lot entitlements are allocated among the newly created lots based on the relative market value).
11.1	It is recommended that an adjustment of the interest schedule continues to be available to lot owners in new schemes in these limited circumstances.
ADJUSTING GROUP USE BY-LAWS	
12	In any community titles scheme over time there may be a change of circumstances such that the existing allocation of expenses is no longer appropriate.
12.1	It is recommended that the body corporate have an ability to add to or amend the group use by-laws at the scheme to accommodate a new expense or if there is a change in the circumstances in the group of lots that are subject to the relevant group use by-law.
12.2	It is recommended that the addition or change should require a special resolution of the body corporate and the consent of all lots that will be subject to the group use by-law.
DISPUTES ABOUT ALLOCATION OF EXPENSES	
13	The Recommendations provide that any expense that is not expressly category 2 or category 3 is to be treated as a category 1 expense. This may include situations where there is failure to agree as to the appropriate category to which to allocate a new expense in a community titles scheme.
13.1	It is recommended that where there is a dispute as to the appropriate allocation of an expense, the body corporate or a lot owner may seek dispute resolution through the office of the Commissioner for Body Corporate and Community Management (BCCM Commissioner) to resolve the dispute.

NUMBER	RECOMMENDATION
EXISTING SCHEMES –TRANSITIONAL ARRANGEMENTS	
14	To achieve consistency, the principles that apply to the allocation of expenses in new schemes should also apply to existing schemes. This may only be achieved by requiring existing schemes to transition to the requirements for new schemes.
14.1	It is recommended that all existing schemes transition to the requirements for new schemes (new requirements) during a transition period of up to three years.
14.2	<p>It is recommended that the transition at existing schemes proceed in stages:</p> <ul style="list-style-type: none"> • Stage 1 will commence when the legislation enacting these Recommendations comes into effect and will last for 12 months. During this time, the body corporate will not be required to take any action, but may seek an expert report or other assistance to prepare for stages 2 and 3. • Stage 2 will require the body corporate to decide on an allocation of expenses for the scheme that complies with the new requirements. This will occur no later than the first AGM of the body corporate for the scheme that falls after the end of stage 1. The new allocation of expenses decided at this AGM will not commence until the start of the following financial year for the scheme. • Stage 3 will commence from the start of the financial year for the scheme following the adoption of the new requirements. From this time, the new requirements will apply to the existing scheme.
15	Some existing schemes may have an interest schedule that does not reflect the relative market value of the lots (e.g. schemes established under the previous Act that were deemed to be community titles schemes under the BCCM Act).
15.1	It is recommended that prior to adopting the new allocation of expenses these schemes should have the opportunity to seek a valuation from a qualified valuer to adjust the interest schedule to reflect the relative market value of the lots in the scheme as at the date the scheme was established.
DISPUTE RESOLUTION DURING THE TRANSITION	
16	The allocation of expenses may be a contested issue in a number of existing schemes, particularly those with a history of changes to lot entitlements. While it is anticipated that in the majority of schemes there will be minimal initial change to the amount of contributions required from each lot owner, it is recognised that not all existing schemes will be able to agree to an allocation of expenses in compliance with the new requirements.
16.1	It is recommended that if an existing scheme is unable to agree to an allocation of expenses in compliance with the new requirements during the transition period then the body corporate or a lot owner will be able to apply to the BCCM Commissioner for dispute resolution.

2. Background

2.1. The Issues Paper

In August 2013, the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) commenced a review of Queensland property law¹ including issues arising under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**).

In February 2014, *Issues Paper 2: Lot entitlements under the Body Corporate and Community Management Act 1997* (**Issues Paper**)² was released for public submissions by the Department of Justice and Attorney-General. It received over 165 submissions from strata industry stakeholders including professional groups, lot owners and solicitors.

The Issues Paper asked a number of questions in relation to setting and adjusting contribution schedule lot entitlements and the allocation of expenses for **new schemes** (being any schemes created after the commencement of new statutory requirements following the Issues Paper) and **existing schemes** (including schemes that were adjusted and reverted under the previous legislation).

2.2. A difficult history

As outlined in the Issues Paper³ the legislation governing lot entitlements in Queensland has a unique history. Between 1965 and 2003, lot entitlements were set at the discretion of the developer. Between 2003 and 2011, developers were required to use the **equality principle**⁴ when setting contribution schedule lot entitlements and the **market value principle**⁵ when setting interest schedule lot entitlements. From 2011, the **relativity principle**⁶ was added as an alternative to the equality principle.

In 1997, the BCCM Act introduced a mechanism to allow contribution schedule lot entitlements to be adjusted by order (an **adjustment order**) of the District Court. In 2003, the power to issue adjustment orders was also granted to specialist adjudicators and, in 2007, the jurisdiction of the District Court to

¹ See Ministerial Media Release, *Review modernises Queensland Property Law*, then Attorney-General and Minister for Justice the Honourable Jarrod Bleijie, 15 August 2013.

² Commercial and Property Law Research Centre, *Issues Paper 2: Lot entitlements under the Body Corporate and Community Management Act 1997* (**Issues Paper**), released by Department of Justice and Attorney-General, available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities>.

³ See Issues Paper, above n 2, at 12-17.

⁴ The equality principle requires that the contribution schedule lot entitlements must be equal except to the extent to which it is just and equitable in the circumstances that they not be equal: *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) s 46A(1).

⁵ The market value principle requires that interest schedule lot entitlements must reflect the respective market values of the lots, except to the extent to which it is just and equitable in the circumstances that they do not reflect the respective market values of the lots: BCCM Act s 46B.

⁶ The relativity principle requires that contribution schedule lot entitlements are set in a way that clearly demonstrates the relationship between the lots in the scheme by reference to one or more particular relevant factors: s 46A(2). The factors are listed in BCCM Act s 46A(3).

issue adjustment orders was transferred to a tribunal.⁷ In all adjustment orders, the BCCM Act required that the contribution schedule lot entitlements must reflect the equality principle. In many cases, this created a significant disparity between the principles for setting contribution schedule lot entitlements and the principles for an adjustment.

In 2011, amendments to the BCCM Act⁸ (**2011 Amendment**) allowed schemes that had been the subject of an adjustment order to revert back to the pre-adjustment contribution schedule. Further amendment in 2013⁹ (**2013 Amendment**) reversed the reversion process and allowed reverted schemes to return to the adjusted schedule. The 2011 Amendment and the 2013 Amendment added uncertainty and created significant anger at a number of schemes. This uncertainty and anger was clearly reflected in the submissions received in response to the Issues Paper.

2.3. The submissions

Many submissions addressed the specific questions in the Issues Paper. A large number of submissions described personal experiences of adjustment or reversion at particular schemes. There was very little consensus among the submissions. However, there was general agreement that some expenses in a community titles scheme should be shared equally and other expenses should be shared differentially.

Some submissions supported the current system for allocating expenses. Often these submissions noted that the equality principle does not mean that all lots pay an equal share of the expenses. In this regard, the equality principle is a type of differential allocation of expenses as lot entitlements are allocated equally, *except* to the extent that it is just and equitable that they not be allocated equally. These submissions generally supported the idea that there are some expenses that should be shared equally and there are other expenses that should be shared on a differential basis.

A number of submissions called for expenses to be allocated to each lot based on the **relative market value**, which is the value of a lot as a percentage of the total value of all lots in the scheme. This is the approach used in New South Wales,¹⁰ Western Australia,¹¹ South Australia¹² and the Australian Capital Territory.¹³

⁷ In 2003, lot owners were given the option to apply to a specialist adjudicator for an adjustment order as an alternative to the District Court. In 2007 the jurisdiction of the District Court was transferred to the Commercial and Consumer Tribunal (which in 2009 was amalgamated into the Queensland Civil and Administrative Tribunal (QCAT)).

⁸ *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (Qld).

⁹ *Body Corporate and Community Management and Other Legislation Amendment Act 2013* (Qld).

¹⁰ Although developers are not directly required to set entitlements in accordance with value for regular strata schemes (as opposed to progressively developed schemes), they may be liable for costs and overpayments if owners seek an adjustment: *Strata Schemes Management Act 1996* (NSW) ss 183(3), 183(6). However, see New South Wales Government, Office of Fair Trading, *Strata Title Law Reform: Strata & Community Title Law Reform Position Paper*, (2013), 29, (**Position Paper**) which has suggested requiring an independent valuation for regular strata schemes. www.fairtrading.nsw.gov.au/sites/ftw/About_us/Have_your_say/Review_of_strata_and_community_scheme_laws.page.

¹¹ *Strata Titles Act 1985* (WA) s 14 (capital value for strata schemes and site value for survey strata schemes).

¹² *Community Titles Act 1996* (SA) s 20 (site value); *Strata Titles Act 1988* (SA) s 6 (capital value).

¹³ *Unit Titles Act 2001* (ACT) s 8 (improved value).

Other submissions called for lot entitlements to be set on the basis of the relative area of the lot, which is the area of the lot as a percentage of the total area of all the lots in the scheme. This approach may be used in Singapore,¹⁴ British Columbia¹⁵ and also in many states in the United States including California¹⁶ and Florida.¹⁷ Generally, these submissions argued that some expenses should be shared equally but that lots which are bigger, more valuable and receive a greater benefit from particular body corporate expenses should pay a greater share of the expenses.

Some submissions supported the idea of allocating administrative fund expenses on the contribution schedule and sinking fund expenses on the interest schedule. Again, these submissions noted that there are some expenses that should be shared equally and other expenses where it is not fair to share the expense equally. The submissions that supported this view felt it would be a relatively simple way of addressing a complex problem.

2.4. The Recommendations

As the submissions demonstrate, there are a wide range of views about what mechanism should be used to achieve the most desirable allocation of expenses within a community titles scheme. The history of lot entitlements in Queensland is complex and there is no perfect solution that will please all stakeholders. The general agreement that some expenses should be shared equally and other expenses should be shared differentially was the only point of commonality among many of the submissions to the Issues Paper.

Based on the submissions, discussions with relevant stakeholders and an analysis of practices in other jurisdictions, the Centre makes the Recommendations outlined in this report. The Centre is committed to making recommendations that are practical, which create certainty and which are balanced.

Any reform to the principles underpinning the allocation of expenses at a community titles scheme must be for the purpose of creating certainty for lot owners, purchasers and industry.

The reforms must also be:

- fair;
- transparent;
- simple; and
- consistent.

¹⁴ Singapore uses a 'just and equitable' test but has guidelines that interpret this to mean an allocation based on perceived usage of common facilities as reflected by floor area. See Building and Construction Authority, Singapore, *Strata Living in Singapore: A General Guide* (2005), 4, http://www.bca.gov.sg/bmsm/others/strata_living.pdf.

¹⁵ *Strata Property Act*, SBC 1998, c 43, s 246.

¹⁶ In California, the procedure for calculating each owner's contribution of the common expenses is contained in the governing documents for the home owners association: Cal Admin Code tit. 10, § 2792.8(a)(4).

¹⁷ In Florida, owner's contributions to the expenses of the body corporate are based on the floor area of the lot: XL Fla Stat § 718.104(4)(f), 718.115(2).

In order to create greater certainty for stakeholders, greater flexibility for developers and increased transparency for purchasers and lot owners, the Centre recommends changes to the current provisions for allocating expenses within community titles schemes.

The allocation of expenses in a community titles scheme should reflect both the cost burden that each lot creates on the expenses of the body corporate and the benefit that each lot receives from the expenditure of the body corporate.

The Recommendations are guided by the following general principles:

- Particular expenses of a body corporate benefit all lots.
 - Where appropriate, these expenses should be shared equally.
 - Where inappropriate to share these expenses equally, they should be shared on the basis of the interest schedule lot entitlement.
- Other expenses of a body corporate benefit some, but not all, lots.
 - Where appropriate, these expenses should be shared equally among the lots that benefit from the expense.
 - Where inappropriate to share these expenses equally, they should be shared among the lots that benefit from the expense on the basis of the interest schedule lot entitlement.

The Recommendations are designed to give greater flexibility for the allocation of expenses in a way that reflects the benefit to the lot and greater transparency around such allocation. Lot owners who enjoy or share the benefit of a body corporate expense should contribute to that expense either equally or on the basis of their ownership interest in the scheme (as determined by the interest schedule lot entitlement).¹⁸ Under the current provisions for allocating expenses within schemes, this does not always occur.

2.5. Rationale for the Recommendations

The contribution schedule lot entitlement is a blunt instrument for allocating expenses. It relies on a single figure to allocate all expenses (except insurance) of the scheme regardless of the benefit a lot receives from the expense and regardless of whether the expense should be allocated equally to all lots. A single figure for all expenses does not adequately differentiate between expenses that benefit all lots equally and expenses that benefit lots differentially. It does not distinguish between expenses that benefit and do not benefit a lot. The current provisions for allocating expenses (as outlined at section 3 below) may result in lot owners paying for the repair and replacement of the common property in a greater percentage than their ownership interest in that common property.¹⁹

Some of the controversy over lot entitlements can be traced to the inadequacy of using a single figure to allocate all expenses. This may be part of what led to a number of adjustment orders in the first place. Owners of lots with a larger lot entitlement felt it was unfair to pay more for every expense at the scheme when all lots clearly received the same benefit from many of these expenses. These lot owners sought, and were granted, adjustment orders under the BCCM Act. Owners of lots with a

¹⁸ BCCM Act s 47(3)(a).

¹⁹ See the example at section 4.2.1 below in relation to Imaginary Scheme.

lower lot entitlement felt it was unfair to pay for every expense at the scheme on an equal (or nearly equal) basis when larger lots clearly benefited from some expenses to a much greater extent than smaller lots.

The current system allocates all costs using a single fixed percentage that has been designed to accommodate differences in use and benefit of body corporate expenses. The Recommendations propose a system of allocating expenses to each lot based on the benefit received by the lot. Lots may benefit from expenses in a number of ways, including where an expense retains or improves the value of the common property or where an expense retains or improves the value of the lot itself. The Recommendations call for a more direct and transparent way of allocating expenses than can be achieved by the current system. Expenses should be allocated in a way that reflects the benefit each lot receives from the expense.²⁰

Bodies corporate are often referred to as the 'fourth tier of government'.²¹ Unlike a government, however, bodies corporate are a collection of private individuals who voluntarily enter into an arrangement to collectively own and maintain common property. In equivalent relationships, each owner's obligation to contribute to the expenses is determined by the ownership interest.

Common expenses of the body corporate should be paid for either equally, or based on the ownership interest in the common property. Where expenses benefit only some, but not all, lots, only those lots that benefit should pay the expense.

The Recommendations propose a new method of allocating expenses for community titles schemes. Some stakeholders may take the view that further change to the allocation of expenses is detrimental either because it contributes to instability of the scheme or because many schemes are satisfied with the way expenses are allocated. While this view has some merit the Centre considers there are substantial benefits to the recommended changes. The Recommendations aim to achieve a more sustainable balance between the competing views while minimising the impact on those schemes that do not see the need for significant change to their current allocations. The advantages of the recommended approach are:

1. The allocation of expenses provides a method that balances both the burden of the lot on the expenses of the scheme and the benefit to the lot from the expenses;
2. The Recommendations provide greater flexibility and control for a body corporate over the life of the scheme. Changes to the allocation of expenses are within the body corporate's control, within certain parameters, rather than requiring an adjustment of lot entitlements;
3. Most schemes of eight lots and less will experience little change in the actual contributions for lot owners. Generally, these schemes have a relatively equal contribution schedule and little difference in market value between the lots (therefore a relatively equal interest schedule). Under the recommended approach the contributions for lots within this type of scheme are unlikely to experience a significant change;

²⁰ See the examples of expenses that benefit all lots equally at paragraph 5.1.2 and expenses that benefit lots differentially at paragraph 5.1.3 below.

²¹ Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia' (2009) *Housing Studies* 24(2), 243-259 at 248.

4. A gradual transition for existing schemes over three years is provided to allow schemes the time to make decisions about the allocation of expenses to the relevant categories. In many cases this will be a simple process where the majority of expenses within the administrative fund are category 1 and the majority of expenses within the sinking fund are category 2;
5. For larger and more complex schemes with different uses (commercial, residential, retail) or schemes with a mixture of building types, the Recommendations provide much needed flexibility in the allocation of expenses to different groups within the scheme who directly benefit from the expense; and
6. The complexity of a community management statement, particularly for new schemes, will be reduced by removal of the contribution schedule lot entitlement and the description about how that lot entitlement was created. This will be replaced by clear principles and rules for the allocation of expenses.

The next section (section 3) of this report will discuss the operation of the current provisions in relation to the way that lot entitlements are allocated and used in Queensland. This will be followed by a discussion (at section 4) highlighting some of the issues with the existing legislation. Finally, section 5 will expand upon and discuss each of the Recommendations contained in section 1.2.

3. Current provisions for allocating expenses

Under the BCCM Act and the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) (**Standard Module**),²² the body corporate prepares an administrative fund budget and a sinking fund budget for each financial year²³ and sets the amount (**contributions**) that each lot owner must pay towards those expenses based on the budgeted amounts.²⁴ The contributions for each lot must be set proportionate to the contribution schedule lot entitlement for the lot. Insurance is treated separately from other expenses and is allocated to each lot on the basis of the interest schedule lot entitlement²⁵ by using the ratio of the interest schedule lot entitlement for the lot to the total interest schedule lot entitlements of all lots at the scheme.

To determine each lot owner's contribution, the lot's contribution schedule lot entitlement is divided by the total contribution schedule lot entitlement for all lots in the scheme. The resulting percentage is multiplied by the amount of the administrative fund budget and the sinking fund budget (excluding insurance expenses) to determine the total costs that each lot owner must pay. The two totals are added together and, along with any amounts for insurance, make up the amount of contributions that the lot owner must pay for the financial year. There may also be special levies (which would be calculated in the same way as above) or other charges that may increase the total amount of contributions for each lot.

The use of lot entitlements to allocate expenses has resulted in a significant focus on the way that lot entitlements are set. The lot entitlements for each lot are allocated by the original owner²⁶ (generally the developer of the scheme) when the scheme is registered and are set out in the contribution schedule and the interest schedule in the community management statement (**CMS**) for the scheme. The discussion below briefly outlines the operation of the current provisions for allocating lot entitlements in Queensland. For a more detailed discussion, refer to the body corporate pages of the Department of Justice and Attorney-General website.²⁷

²² Each community titles scheme is subject to a Regulation Module: BCCM Act s 21. The discussion in this report deals with the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) (**Standard Module**). The other Regulation Modules are: *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) (**Accommodation Module**); *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) (**Commercial Module**); *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) (**Small Schemes Module**); and *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld) (**Two-lot Module**). The other Regulation Modules generally contain equivalent provisions.

²³ Standard Module s 139.

²⁴ Standard Module s 141.

²⁵ Standard Module s 141(5). See sections 178, 181 and 182.

²⁶ BCCM Act s 13(1).

²⁷ <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/financial-management/about-lot-entitlements/>.

3.1. Setting the contribution schedule lot entitlement

The developer may use either the equality principle or the relativity principle²⁸ as the contribution schedule principle when setting the contribution schedule lot entitlement. The CMS for a scheme must:

- state the contribution schedule principle on which lot entitlements have been decided; and
- if the equality principle is used and the lot entitlements are not equal, explain why they are not equal; or
- if the relativity principle is used, include sufficient detail to show how individual contribution schedule lot entitlements were decided using it.²⁹

The explanation or details must be in plain English and only as detailed as necessary for an ordinary person to understand it.³⁰

3.2. Adjusting the contribution schedule lot entitlement

The contribution schedule may be adjusted by a resolution without dissent.³¹ Alternatively, the owner of a lot may apply to a specialist adjudicator or the Queensland Civil and Administrative Tribunal (QCAT) for an adjustment of the contribution schedule if:

- the scheme has been affected by a material change³² since the last time the lot entitlements were decided; or
- following a formal acquisition,³³ if the changed schedule is not consistent with the deciding principle or if there is no deciding principle, is not just and equitable; or
- for a scheme established after 14 April 2011 (which has not had an adjustment order following a resolution without dissent) if the owner believes the contribution schedule lot entitlements are not consistent with the relevant deciding principle as explained in the CMS.³⁴

There may also be an adjustment of the contribution schedule in the following limited circumstances:

- by agreement among two or more lot owners to reallocate the lot entitlements among themselves;³⁵ or

²⁸ BCCM Act s 46(7). The equality principle is described in BCCM Act s 46A(1) and the relativity principle is described in BCCM Act s 46A(2).

²⁹ BCCM Act s 66(1)(db).

³⁰ BCCM Act s 66(1A).

³¹ BCCM Act s 47A; s 105 (definition of 'resolution without dissent').

³² BCCM Act s 47B(1); Schedule 6 (definition of 'material change'). See also *Heaton v Body Corporate for 'Windsong Apartments' CTS 31804* [2012] QCAT 45 and *Moses v Body Corporate for Rhode Island Community Titles Scheme 20573* [2012] QCAT 322 which limit material changes to changes of a physical nature.

³³ BCCM Act s 47B(2A); Schedule 6 (definition of 'formal acquisition').

³⁴ BCCM Act s 47B(2).

³⁵ BCCM Act s 50.

- in the event of an amalgamation (lot entitlements are added together)³⁶ or subdivision (lot entitlements are allocated among the newly created lots by the lot owners).³⁷

In each of these limited circumstances, there is no change to the contribution schedule lot entitlement of the other lots in the scheme.

3.3. Setting the interest schedule lot entitlement

The interest schedule lot entitlement must be consistent with the market value principle,³⁸ which requires that interest schedule lot entitlements must reflect the respective market values of the lots, except to the extent which it is just and equitable in the circumstances that they do not reflect the respective market values of the lots.³⁹

3.4. Adjusting the interest schedule lot entitlement

The owner of a lot in a community titles scheme may apply to a specialist adjudicator or to QCAT⁴⁰ for an order adjusting the interest schedule. The order must be consistent with the market value principle, as applied in relation to the respective market values of the lots included in the scheme when the order is made.⁴¹

The interest schedule may also be adjusted in limited circumstances such as by written agreement between lot owners to re-allocate the lot entitlements of their lots amongst themselves⁴² or in the case of subdivision (the lot entitlements are divided between each lot on the basis of the market value principle) or amalgamation of two or more lots into one lot (the lot entitlements of the pre-amalgamation lots are added together).⁴³ In each of these limited circumstances, there is no change to the interest schedule lot entitlement of the other lots in the scheme.

While not expressly provided in the BCCM Act, it is arguable that the interest schedule may also be adjusted by a resolution without dissent at a general meeting of the body corporate to record a new CMS. A resolution without dissent is required to record a new community management statement.⁴⁴

³⁶ BCCM Act s 51C.

³⁷ BCCM Act s 51B.

³⁸ BCCM Act s 46(8).

³⁹ BCCM Act s 46B.

⁴⁰ BCCM Act s 48.

⁴¹ BCCM Act s 48(5).

⁴² BCCM Act s 50. This section applies to both contribution schedule and interest schedule lot entitlements.

⁴³ BCCM Act s 51B-51C. These sections apply to both contribution schedule and interest schedule lot entitlements.

⁴⁴ BCCM Act s 62(2). However, some situations require a lower threshold. See BCCM Act s 62(3)-(8).

4. Issues with the current provisions

4.1. Distinguishing between equality and relativity

The submissions to the Issues Paper highlighted a number of problems with the equality principle and the relativity principle.

Firstly, the difference between the equality principle and the relativity principle is unclear. Except for two factors (the impact on the cost of maintaining the common property and market value) both use the same considerations when allocating contribution schedule lot entitlements.⁴⁵

Secondly, the factors for the equality and relativity principle do not provide adequate consideration of capital expenditure and replacement costs for capital items. This means that lot owners may be paying for repairs to, and replacement of, the common property at a higher percentage than their ownership interest (as determined by the interest schedule lot entitlement)⁴⁶ in that common property.

Finally, it was noted that the description of the contribution schedule principle and the explanation or detail of how individual contribution schedule lot entitlements were allocated using it⁴⁷ required to be included in the CMS may be meaningless. In some cases the description is so vague that the allocation of lot entitlements cannot be verified by a third party. This means it is impossible to determine whether the allocation is consistent with the deciding principle.

4.2. Difficulty using one figure to allocate all expenses

Some submissions noted that using contribution schedule lot entitlements to allocate expenses in a scheme is problematic because the contribution schedule does not reflect the best allocation of expenses. As a single figure for all expenses, the contribution schedule lot entitlement does not adequately distinguish between the costs involved with meeting the expense and the benefit received by a lot. Lot owners contribute money to the maintenance, repair and replacement of common property and body corporate assets which do not provide any benefit to their lot. Further, lot owners may pay for the repair and replacement of common property in a share greater than their ownership interest in that common property.

4.2.1. Example Imaginary Scheme

An example of the difficulty using one figure to allocate expenses may be found in the example of the Imaginary Scheme (which was used in the Issues Paper).⁴⁸ This scheme has eight lots in a single, six level building. The building was set up with a penthouse lot on each of the top two floors and two lots on each of the other floors. After amalgamations, the ground floor and level 2 also contain only one lot each.

⁴⁵ See the factors in BCCM Act s 49(4) and s 46A(3).

⁴⁶ BCCM Act s 47(3)(a).

⁴⁷ Required by BCCM Act s 66(1A).

⁴⁸ See Issues Paper, above n 2, 41-44 at 4.2.

The Imaginary Scheme is an adjusted scheme, meaning that an adjustment order applied the equality principle to adjust the original allocation of lot entitlements (which had been set based on the market value of the lots under the previous legislation). The (adjusted) lot entitlements for the scheme are as follows:

LOT ENTITLEMENTS FOR <i>IMAGINARY SCHEME</i>		
LOT	CONTRIBUTION SCHEDULE	INTEREST SCHEDULE
1 in SP3746	13	16
3 in BUP12345	12	8
4 in BUP12345	12	8
5 in SP5987	13	16
7 in BUP12345	12	8
8 in BUP12345	12	8
9 in BUP12345	13	18
10 in BUP12345	13	18
TOTAL LOTS: 8	CONTRIBUTION AGGREGATE: 100	INTEREST AGGREGATE: 100

Some expenses of the Imaginary Scheme are appropriate to share equally among all lots, as all lots receive an equal benefit. This includes expenses like the administrative costs of engaging a body corporate manager and the costs of cleaning the common property. Other examples include the expenses for the maintenance and cleaning of facilities like a pool and gym. All lots have equal right to use the facility (even if some lot owners never do) and all lots benefit from the facility (the value of a lot in a scheme that has a pool and a gym is generally greater than the value of a lot in an equivalent scheme without such facilities). Therefore it is appropriate to share these expenses equally among all lots.

In the Imaginary Scheme these types of administrative, cleaning and maintenance expenses are not shared equally. The larger lots pay 13% of these types of expenses compared to the smaller lots, which pay 12% of these types of expenses.

Other expenses, for example, improvements of a capital nature to the building such as painting or replacing the roof benefit lots differently. This type of capital expenditure improves or retains the value of the common property. Lots with a larger share of the common property receive a greater benefit from the capital expenditure in the form of the increased (or retained) value. Improvements to the common property may also reduce the risk of personal injury claims arising against the body corporate.

In the Imaginary Scheme lot 3 and lot 4 (on the first floor) pay a combined 24% (12% each) of the cost of painting the building. Lot 10, on the top floor, with an area equal to the combined area of lot 3 and 4, pays 13% of the cost of painting. Lots 3 and 4 together own 16% (8% each) of the common property but pay 24% (12% each) of the cost of painting. Lot 10 owns an 18% share of the common property but pays 13% of the cost of painting.

5. Recommendations

The Recommendations in this section are designed to address the situation that may occur at schemes like the Imaginary Scheme where expenses that should be shared equally are not being shared equally and expenses that benefit some lots more than others are not being paid for in proportion to the benefit received by the lot.

The Centre is of the view that the allocation of expenses in community titles schemes should reflect both the cost burden that each lot creates on the expenses of the body corporate and the benefit that each lot receives from the expenditure of the body corporate. Expenses should be allocated directly, rather than indirectly.

The Recommendations propose a method of allocating expenses directly to different categories with the total expenses in each category divided among the relevant lots either equally or on the basis of the interest schedule lot entitlement.

Recommendations 1-9 concern the allocation of expenses for new schemes (established after the commencement of the legislation implementing these Recommendations) and consequential amendments to other areas of the BCCM Act that are required if the Recommendations are accepted.

Recommendations 10 – 13 deal with the circumstances in which adjustments may be required to the allocation of expenses in new schemes after the scheme has been created.

Recommendations 14 – 16 address transitional issues for existing schemes.

5.1. New Schemes

5.1.1. A new way of allocating expenses

1	The single figure (currently the contribution schedule lot entitlement) used to allocate expenses within a community titles schemes is incapable of adequately differentiating appropriate contributions for lots in modern schemes.
1.1	It is recommended that contribution schedule lot entitlements should not be used to determine the allocation of expenses. For new schemes, a contribution schedule should not be required.
1.2	It is recommended that expenses of the body corporate for a community titles scheme should be allocated into one of three expense categories as set out in Recommendations 2-4 below.

As discussed above,⁴⁹ under the current requirements, all expenses (except for insurance) in a community titles scheme are allocated according to the ratio of the contribution schedule lot entitlement for the lot to the total contribution schedule lot entitlements for the scheme. This creates a situation where lot owners contribute to expenses at the same fixed percentage regardless of the

⁴⁹ See section 3.

type of expense. Lots with larger lot entitlements pay a larger share of expenses that should be shared equally by all lots. Lots that do not benefit at all from a particular expense may be contributing toward the cost of meeting that expense.

Contribution schedule lot entitlements are allocated in a way that is intended to compensate for this fact through the application of the equality principle or the relativity principle. The allocation should consider that the lots in the scheme benefit from, and create a burden on, the expenses of the body corporate differently. Lots that consume a greater percentage of the expenses of the body corporate should have a larger contribution schedule lot entitlement. Lots that consume a lesser percentage of the expenses of the body corporate should have a smaller contribution schedule lot entitlement.

However, the process of allocating lot entitlements this way is not transparent and is not readily understandable. As mentioned in section 4.1, the statement in the CMS explaining or detailing how individual contribution schedule lot entitlements were allocated is often meaningless. The Centre understands that in some cases, the developer will allocate expenses to different categories and then ‘reverse engineer’ the lot entitlements to take account of the allocation of expenses.

The process of allocating expenses could be made more transparent if rather than using a fixed percentage for most expenses, each expense is categorised based on the type of expense – those that benefit all lots equally; those that benefit all lots differently; and those that benefit just some lots, either equally or differently. The expenses in each category could then be divided as relevant based on the type of expense. This approach is much more direct.

Most lot owners who made submissions in response to the Issues Paper agreed that particular body corporate expenses should be shared equally, as all lots benefit equally from the expense, while other expenses should be shared based on the benefit the lot receives from the expense. A lot may benefit from an expense differently than other lots in the scheme for example if that lot owns a larger percentage of the common property or based on factors relating to the lot, such as the area, the number of bedrooms or the level or location of the lot in the building.

The Recommendations do not propose any change to the current procedure for creating the administrative fund budget, the sinking fund budget or the process of sinking fund forecasting. Recommendations 1-5 propose a change to where the money comes from, not where it goes.

Category 1, category 2 and category 3 expenses may be found in either the administrative or sinking fund. These Recommendations, if accepted, will mean that administrative fund and sinking fund budgets will still be determined and approved in the current way. The difference will emerge when determining the contribution that each lot owner must pay. Rather than multiplying the budget amounts by the relevant lot entitlement proportion for each lot, the expenses will be attributed to the appropriate category, and an appropriate amount worked out in each category for each lot in the scheme. The category 1, category 2 and category 3 (if any) amount for each lot will be added together to determine the total contribution for the lot for the financial year.

This will create greater transparency as to the way expenses are allocated and allow lot owners to truly understand where their money is going. It is anticipated that at most schemes, there will be very little change in the contributions payable by each lot owner.

5.1.2. Category 1 expenses – shared equally

2	Most expenses of a body corporate for a community titles scheme benefit all lots equally. These expenses will usually be related to the administration of the scheme, cleaning or regular (recurrent) maintenance of the common property and body corporate assets, and payments to service contractors.
2.1	It is recommended that expenses related to administration of the scheme, cleaning or other regular recurrent maintenance of common property and body corporate assets, and payments to service contractors should be shared among all lots equally as category 1 expenses .
2.2	It is recommended that the Regulation Modules provide examples of typical category 1 expenses for a community titles scheme.
2.3	It is recommended that expenses of the body corporate for a community titles scheme that are not within either category 2 or category 3 should also be treated as category 1 expenses.

Most expenses of a community titles scheme will fall into category 1. These expenses benefit all lots equally and it is appropriate that category 1 expenses (and any other expenses that are not category 2 or category 3) are shared equally among all lot owners. Generally, these expenses will be found in the administrative budget for the scheme and will be non-capital in nature.

Examples of category 1 expenses include administrative costs such as the cost of engaging a body corporate manager and bank or accounting fees. Fees charged by a body corporate manager (which include administrative costs) are generally charged on a per lot basis, which means that each lot creates an equal burden on the body corporate (in terms of expenses) and each lot receives an equal benefit (in terms of the service provided).

Other examples of category 1 expenses include pest control, gardening and regular, recurrent maintenance of common property and body corporate assets like the lift, the pool or other facilities. Lot owners have equal access to these facilities which means that all lots benefit from the expense (even if a lot owner does not actually use the facility). Regular maintenance improves the amenity of the common property and the benefit flows through to all lot owners who use the common property or the facility.

Expenses that are not expressly category 2 or category 3 will be treated as category 1 expenses. Where there is a dispute as to whether a particular expense should be allocated to category 1, 2 or 3, the lot owners and the body corporate will have access to dispute resolution through the BCCM Commissioner's office, as suggested in Recommendation 13 below.

5.1.3. Category 2 expenses – shared on interest schedule

3	Some expenses of a body corporate for a community titles scheme benefit all lots differently, depending upon the location, size or nature of the lot. These expenses will usually be of a capital or non-recurrent nature and relate to the repair and replacement of common property or body corporate assets.
3.1	It is recommended that expenses of a capital or non-recurrent nature (including insurance) should be shared among all lots on the basis of their interest schedule lot entitlement as category 2 expenses .
3.2	It is recommended that the Regulation Modules provide examples of typical category 2 expenses for a community titles scheme.
3.3	It is recommended that the Regulation Modules require the body corporate to maintain a register listing the category 2 expenses for the scheme.
3.4	It is recommended that the category 2 expenses for a scheme be listed in the body corporate information certificate provided to interested persons by the body corporate.

Some expenses in a community titles scheme benefit all lots on the basis of a lot's interest in the common property, the size or area of the lot, its number of bedrooms or its location in the scheme. These expenses will generally be capital in nature and should be treated as category 2 expenses. It is recommended that category 2 expenses be shared on the basis of the interest schedule lot entitlement. In schemes where all lots have an equal interest schedule lot entitlement these expenses will be shared equally.

The Centre is of the view that it is appropriate to use the interest schedule lot entitlement to allocate category 2 expenses for several reasons. First, the interest schedule represents each lot's ownership share of the common property and interest in the scheme on termination.⁵⁰ Lot owners with a greater share of the common property receive a greater benefit from capital improvements to the common property. As the common property increases in value as a result of the capital repairs, the value accumulates to lot owners in proportion to their ownership share of the common property. For this reason, it is appropriate that capital expenses relating to the repair and replacement of common property should be paid for in the same percentage as that property is owned by lot owners as tenants in common.

Secondly, the interest schedule lot entitlement represents the value of each lot as a proportion of the value of all lots in the scheme. Generally, the more expensive the lot, the larger it is, the more bedrooms it has and the higher its location in the scheme. Where the benefit a lot receives is proportional to its area, number of bedrooms or location in the scheme, the difference between using the interest schedule lot entitlement to allocate category 2 expenses compared to the allocation that would result if the lot's area, location or number of bedrooms were used is likely to be minimal.

⁵⁰ BCCM Act s 47(3)(a)-(b).

Thirdly, allocating expenses on the basis of area, number of bedrooms or location would require new factors to be introduced in the legislation to calculate these for each lot. Rather than provide for several different types of calculations, the Centre recommends the use of a figure that is already in the legislation and which is readily understood by the industry and stakeholders.

Finally, the BCCM Act and the Regulation Modules already provide for some expenses to be shared based on the benefit to the lot. Under the Regulation Modules, insurance premiums for both public liability and the replacement cost of common property and body corporate assets are generally allocated to lots on the basis of the interest schedule lot entitlement.⁵¹ If Recommendation 3 is accepted, public liability insurance and insurance for the replacement cost of common property will be category 2 expenses.

The Regulation Modules anticipate that the BCCM Act or the relevant Regulation Module itself may specify other matters where the liability to meet the relevant expense is not determined on the basis of the contribution schedule lot entitlement.⁵² At present, insurance is the only expense that is allocated on the basis of the interest schedule lot entitlement. There is no reason why other expenses could not be allocated on this basis when the nature of the expense means that lots benefit differentially.

Recommendations 3.2 to 3.4 together require that there is a clear list of the category 2 expenses in a community titles scheme and ensure that the list is available to lot owners and disclosed to prospective purchasers or others that request a body corporate information certificate.

It is recommended that the Regulation Modules provide examples of the types of expenses that should be treated as category 2 expenses. The items should relate to capital expenditure such as:

- Repair or replacement of any buildings or structures that form part of the common property;
- repair or replacement of the roof;
- painting of the building;
- repair or replacement of the lifts;
- repair or replacement of fire protection infrastructure; as well as
- public liability insurance; and
- insurance for the replacement value of common property and body corporate assets.

The idea underpinning this Recommendation is that capital expenditure which flows to the capital value of the building and improves (or retains) the value of the common property should be paid for by lot owners in the proportion that they own that common property. Insurance is paid for in this way because lot owners have an insurable interest in the common property proportionate to their interest schedule lot entitlement. The interest in the common property should be the determining factor in

⁵¹ Standard Module s 178(4); Accommodation Module s 176(4); Commercial Module s 135(4); Small Schemes Module s 112(4); Two Lot Module s 48(4). Building insurance may require allocation on a different basis (for example, see Standard Module ss 179-190). For further information, see <http://www.qld.gov.au/law/housing-and-neighbours/body-corporate/body-corporate-insurance/insurance-premium-and-excess/>.

⁵² Standard Module s 141(5). The other Regulation Modules contain equivalent provisions. See Accommodation Module s 139(5); Commercial Module s 100(5); Small Schemes Module s 75(3); Two Lot Module s 24(3).

paying for expenses that directly relate to the repair or replacement of that common property, as it is when paying for insurance to cover the risk that arises from use of that common property.

Expenses that meet the definition of category 2 expenses should be treated as category 2 expenses by the body corporate. Given the diversity of schemes, it is unlikely that the Regulation Modules could prescribe a definitive list of category 2 expenses. It is recommended that the Regulation Modules, when describing category 2 expenses should list examples of the types of expenses that are likely to be category 2 expenses.

Additionally, it is recommended that each body corporate create and maintain a register listing the category 2 expenses for the scheme. This register can be updated whenever a new category 2 expense is approved in the budget. The register will be available for lot owners to search as part of the body corporate records. Additionally, the category 2 expenses for the scheme will be listed along with the other information disclosed in a body corporate information certificate. This certificate may be requested by interested persons⁵³ and is generally used by prospective purchasers. Including this additional financial information will be a matter of amending the relevant approved form for the certificate.

Under the BCCM Act and the Regulation Modules, the body corporate may supply services to the common property and to lots. The body corporate may do this by engaging a service contractor under a service contract.⁵⁴ Examples of services that may be supplied in this way are caretaking services or pool cleaning services. Where these services are supplied to all lots and the common property, they should be category 1 expenses. Where the services benefit some lots more than others in terms of the improving or retaining the value of the lot, the body corporate may agree to treat the expense as a category 2 expense.

If the body corporate cannot agree whether the expense should be treated as a category 2 expense, the matter could be determined by an application to the BCCM Commissioner for dispute resolution, as suggested in Recommendation 13 below.

5.1.4. Category 3 expenses – benefiting some but not all lots

4	Some expenses of a body corporate for a community titles scheme benefit some, but not all, lots. These expenses are generally capital in nature or relate to the maintenance, repair or replacement of capital items such as particular common property (including utility infrastructure), particular body corporate assets or a particular service provided by the body corporate to certain lots.
4.1	It is recommended that expenses that benefit only some lots should be shared either equally or on the basis of the interest schedule lot entitlement, but only among the lots that receive some benefit from the relevant expense as category 3 expenses .
4.2	It is recommended that category 3 expenses are allocated to particular lots through a group use by-law as set out in Recommendation 5 below.

⁵³ BCCM Act s 204(4).

⁵⁴ BCCM Act s 15 (definition of ‘service contractor’) and schedule 6 (definition of ‘service contract’).

4.3	It is recommended that the Regulation Modules require the body corporate to maintain a register listing the category 3 expenses for the scheme.
4.4	It is recommended that the category 3 expenses for a scheme be listed in the body corporate information certificate provided to interested persons by the body corporate.

Not all schemes will have category 3 expenses. Category 3 expenses are those that benefit some, but not all, lots in the scheme. Category 3 will include some expenses that are appropriate to share among the relevant lots equally such as administration costs and non-capital, recurrent maintenance expenses. These expenses will be akin to category 1 expenses with the exception that they benefit just some lots in the scheme. Category 3 will also include expenses that are capital in nature which are akin to category 2 expenses with the exception that they benefit just some lots in the scheme.

Generally a category 3 expense will be related to common property, a building or other infrastructure which clearly relates to only certain lots. In some cases, it may be obvious that not all lots in the scheme benefit from an expense. Consider the example of a mixed-use scheme that contains commercial and residential lots. The commercial lot is unlikely to benefit from the expenses related to the swimming pool.

In other situations, the benefit that a lot receives from an expense of the body corporate may not be obvious. Consider the example of a scheme where many, but not all, of the lots have balconies with balustrades. The lot owners without balconies may object to an expense to repair the balustrades on the basis that they receive no benefit from the expense. However, the balustrades form part of the common property which is owned by all lot owners (including those that do not have balconies). Repairing the balconies improves the overall look of the building which benefits all lots in the scheme. Balconies that are in good condition reduce the risk of personal injury to occupants and visitors. All lots benefit from the reduction in risk.

It is not anticipated that lot owners will be able to use this category to avoid contributions for repair or maintenance of common property merely because their lot or lots do not directly benefit from or use the common property. Apportioning benefit to lots will be ‘a matter of judgement, not science.’⁵⁵

For a particular example of how category 3 expenses will work consider a scheme that contains a high-rise tower and a block of low-rise townhouses. Lot owners in the townhouses may argue that they do not use the lift in the tower and do not benefit from the roof of the tower and therefore should not contribute to the expense of repair and maintenance for these items. Likewise, lot owners in the tower do not benefit from the roof, or other expenses related to, the townhouses.

Currently all lot owners in this type of scheme contribute to the sinking fund which will provide for the replacement of the lift in the tower and the roof of both the tower and the townhouses. All lot

⁵⁵ *Mashane Pty Ltd v Owners Corporation RN 328577* [2013] VSC 417 at para 59, citing *Mashane Pty Ltd v Owners Corporation RN328577 (Owners Corporation)* [2013] VCAT 118. *Mashane* involved a situation where the owner of a lot without balustrades did not want to contribute to the expense of repairing the balustrades in the other lots. The Victorian Civil and Administrative Tribunal held that the lot owner did receive a benefit from the expense and the apportionment of the benefit by the body corporate had been reasonable. The decision was appealed to the Victorian Supreme Court which dismissed the appeal.

owners will also contribute to the administrative fund which covers costs for running the scheme, including those specific to the tower and those specific to the townhouses.

Under the current legislation, the only way to ensure that lot owners in the tower pay for the expenses related to the tower and lot owners in the townhouses pay for the expenses related to the townhouses is to create a layered scheme with two subsidiary schemes. Such an arrangement would produce three bodies corporate where in reality, only one is needed. Three bodies corporate will cost more to operate than one body corporate.

Category 3 expenses and group use by-laws will allow developers to create a system where lot owners in the townhouses pay for the townhouses and lot owners in the tower pay for the tower. This will be achievable in one scheme.

The body corporate may also supply services, including utility services, for the benefit of owners and occupiers.⁵⁶ These services are supplied under an agreement between the body corporate and the lot owner (or the person for whom the service is supplied). Lot owners pay for the service according to the relevant agreement. The body corporate is under an obligation to ensure to the greatest practicable extent that the total cost of providing services under these types of agreements are recovered from the users of the service.⁵⁷

The charges incurred by lot owners under these types of agreements are not body corporate expenses but are expenses incurred by the lot. As such, they are outside the categories discussed in these Recommendations. For the avoidance of doubt, the Recommendations will not affect the ability of the body corporate to continue to enter into these types of agreements. However, any amounts that are not recovered by the body corporate from the users of the service will have to be allocated to the relevant category. If the service is provided to just some lots, the body corporate may have the alternative to allocate the expense of the service through a group use by-law as a category 3 expense.

It is recommended that the body corporate information certificate should include the details of any category 3 expenses that apply in relation to a lot.

5.1.5. Group use by-laws

5	If accepted, Recommendation 4 will allow an expense that relates to particular common property, body corporate assets or a particular service provided by the body corporate to some, but not all, lots to be allocated to the group of lots that benefit from the expense.
5.1	It is recommended that the group of lots that receive some benefit from a category 3 expense should collectively be responsible for the maintenance, repair and replacement of the relevant asset or property, or the cost of the service.

⁵⁶ As provided in BCCM Act s 158 and the relevant Regulation Module: Standard Module s 169; Accommodation Module s 167; Commercial Module s 125; Small Schemes Module s 103; Two Lot Module s 41. Utility services are defined very broadly: BCCM Act schedule 6 (definition of 'utility services').

⁵⁷ See relevant Regulation Modules, for example, Standard Module s 169(3).

5.2	It is recommended that the obligation to contribute to a category 3 expense should be formalised in a group use by-law which will define the relevant asset, property or service and the lots that benefit and are obligated to contribute to the cost of meeting the expense.
5.3	It is recommended that the group use by-law express whether the benefiting lots will contribute to the category 3 expense equally or on the basis of the lot's interest schedule lot entitlement (as appropriate or as specified in the legislation).

An **exclusive use by-law** may give exclusive use of a part of the common property or a body corporate asset to a particular lot in the scheme.⁵⁸ For example, a courtyard attached to a lot may actually be common property, but subject to an exclusive use by-law which allows the owner of the lot to have exclusive use of that courtyard. An exclusive use by-law may impose a monetary obligation on the lot owner⁵⁹ by requiring the lot owner to pay for the maintenance associated with the relevant common property or body corporate asset (either directly or by reimbursing the body corporate).⁶⁰

However, exclusive use by-laws may not give exclusive use of utility infrastructure that is common property or a body corporate asset.⁶¹ Utility infrastructure includes the cables, pipes, sewers, drains, plant and equipment by which lots or common property are supplied with utility services such as water, gas, air conditioning, drainage or waste removal.⁶²

This may create issues in schemes with mixed commercial and residential lots. The commercial lot may be a restaurant that benefits from air conditioning and sewerage systems, which the residential lots do not use. A group use by-law would ensure that the commercial lot pays for the benefit of the air conditioning and sewerage systems and the residential lots which receive no benefit from these systems are not required to pay for them. The only way to achieve this outcome under the existing legislation is to create separate schemes for those lots that use a particular utility infrastructure or to create separate lots, outside the scheme, governed by a building management statement.

A group-use by-law may overcome this problem by providing for the lots that benefit from the expense to contribute to the expense. In this way, the commercial lots will be required to pay for the repair, replacement and maintenance of the common property used by them, including utility infrastructure. Similarly, a group use by-law could ensure that the commercial lots do not pay for expenses related to items of common property solely for the benefit of residents, such as a swimming pool.

Unlike an exclusive use by-law, a group use by-law will not provide a right to exclude other lot owners from using the relevant common property, asset or service. Rather, the group use by-law is designed to ensure that the cost burden is paid for by the lots that receive the benefit.

As an example, a large high rise may have an express lift that services only the top five levels in the building. A group use by-law could be used to ensure that the category 3 expense (the repair and

⁵⁸ BCCM Act s 170.

⁵⁹ Exclusive use by-laws are the exception to the general rule that by-laws may not impose a monetary obligation: BCCM Act s 180(6).

⁶⁰ See also, for example, Standard Module ss 173-175.

⁶¹ BCCM Act s 177(1).

⁶² BCCM Act schedule 6 (definition of 'utility infrastructure' and 'utility service').

maintenance of the express lift) is paid for by lots on those levels. This would not exclude other lot owners on the lower levels from using the lift (for example to visit friends on the top floor).

5.1.6. Polls and special resolutions

6	<p>If accepted, Recommendation 1 will remove the need for a contribution schedule lot entitlement for lots in new schemes. This will require consequential amendment to the way the BCCM Act deals with polls and with counting of votes for a motion to be decided by a special resolution.</p> <p>The Procedural Paper has asked for public submissions on whether there are any reasons to retain the ability to call for a poll on a motion to be decided by an ordinary resolution at a general meeting.</p>
6.1	<p>It is recommended that, depending on the responses to the question in the Procedural Paper, the use of polls be prohibited altogether or, if retained, that polls are determined in accordance with the interest schedule lot entitlements.</p>
6.2	<p>It is recommended that a motion to be decided by special resolution at a general meeting of a body corporate should require at least two-thirds of the votes cast are in favour of the motion and that the votes counted against the motion are not more than 25% of the number of lots included in the scheme.</p>

These Recommendations propose removing the need for a contribution schedule lot entitlement to determine a lot owner's share of contributions to the common expenses. However, the contribution schedule lot entitlement is also used when counting votes for a poll on an ordinary resolution and when determining whether a motion has been passed by special resolution.

If a poll is properly requested for a motion to be decided by an ordinary resolution of the body corporate, the motion will only pass if the total contribution schedule lot entitlements of the lots voting in favour of the motion are more than the total contribution schedule lot entitlements for the lots voting against the motion.⁶³ The justification for this is that it gives an extra level of protection to lots that pay more of the expenses in the scheme by giving their vote extra weight when deciding the motion.

In an issues paper titled *Procedural issues under the Body Corporate and Community Management Act 1997*,⁶⁴ (**Procedural Paper**) it was noted that there is a perception that polls are not commonly called. The Procedural Paper asked for public submissions as to what types of ordinary resolutions are decided by a poll and whether there are any reasons to retain the ability to call for polls. Depending on the responses to the relevant questions, there are two options for dealing with polls in the context of the Recommendations contained in this report.

⁶³ BCCM Act s 110(3)(c).

⁶⁴ As at the date of writing, the Procedural Paper has not been released for public submission. When it is released, it will be available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

The first is to remove the ability to call for polls altogether. If polls are in fact rarely used, there may be little need to continue to provide for polls in the BCCM Act. Alternatively, if polls are regularly used, there is some justification for using the interest schedule lot entitlement when counting votes for a poll. This is because the interest schedule determines the ownership interest of each lot in the scheme. It is arguable that those that own a higher percentage of the scheme should have a greater say in how the affairs of the scheme are conducted.

Special resolutions are used for procedural matters such as amending the by-laws, changing the applicable Regulation Module for the scheme⁶⁵ or determining how voting is to be done at a general meeting.⁶⁶ However, a special resolution may be necessary for some items that require significant spending, including making improvements to the common property,⁶⁷ entering into a lease of up to three years or acquiring personal property over a specified amount.⁶⁸

Under the current BCCM Act, when a motion of the body corporate requires a special resolution, the motion will only pass if the total contribution schedule lot entitlements of the lots that vote against the motion are not more than 25% of the total contribution schedule lot entitlements for the scheme.⁶⁹ For schemes that have been set up using, or that have had lot entitlements adjusted to, the equality principle, 25% of the lots are likely to have approximately 25% of the contribution schedule lot entitlements. There is little reason to keep this requirement.

The Centre recommends that the requirement relating to contribution schedule lot entitlements when counting votes for a special resolution be removed. A special resolution will still require the consent of two thirds of the votes cast and will not pass if opposed by more than 25% of the total number of lots in the scheme.

5.1.7. Utility services provided by a utility service provider

7	If accepted, Recommendation 1 will remove the need for a contribution schedule lot entitlement for new schemes. This will require consequential amendment to the liability of a lot owner to a utility service provider for a utility service that is not individually metered to each lot.
7.1	<p>It is recommended that where:</p> <ul style="list-style-type: none"> • a utility service provider supplies a utility service to each lot in the scheme and the common property; and • there is no practical way available to the utility service provider to measure the extent to which the utility service is supplied to each lot and the common property; and • the utility service is charged according to usage and not on the basis of land value, <p>then each lot owner should be liable to the utility service provider for an equal share of the total amount payable for the supply of the utility service.</p>

⁶⁵ BCCM Act s 62(3).

⁶⁶ See for example, Standard Module ss 15 and 87.

⁶⁷ Standard Module s 163(c).

⁶⁸ Standard Module s 166.

⁶⁹ BCCM Act s 106(3)(c). A special resolution also requires at least two-thirds of the votes cast must be in favour of the motion and no more than 25% of the number of lots in the scheme vote against the motion.

7.2	It is recommended that there be consultation with utility service providers to identify possible changes to current billing practices in these situations so that the billing process can more closely approximate the actual benefit received by each lot in terms of the supply of the utility service and the burden that each lot creates in terms of the total amount payable for the supply of that service.
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The BCCM Act⁷⁰ provides that where a utility service provider⁷¹ supplies a service to each lot in the scheme and the common property, if there is no practical way available to the utility service provider to measure the extent to which the utility is supplied, the lot owners in the scheme are liable to pay to the utility service provider a share of the total amount payable for the provision of the utility service to scheme land that is proportionate to the lot's contribution schedule lot entitlement.⁷² If these Recommendations are accepted, there will not be a contribution schedule for new schemes. As such, in situations where utility services are supplied in this manner by a utility service provider, each lot owner's liability will have to be determined on a different basis.

The Centre understands that the utility most commonly supplied by a utility service provider to lots and common property where there is no practical method to individually measure the usage is water. In schemes where there are no individual water meters, lot owners will be liable to pay for the water usage in the scheme in proportion to their contribution schedule lot entitlement. However, from 1 January 2008, individual metering is required for new schemes.⁷³

For this reason, the Centre recommends that at new schemes, if there is no practical way available to measure the extent of the usage of a utility provided to each lot and the common property by a utility service provider, lot owners should be liable for an equal proportion of the utility charge.

This Recommendation should have very little impact on new schemes given the requirement for individual water metering. The application to existing schemes may be more challenging. If these Recommendations are accepted, lot owners in existing schemes that have utilities like water which are not individually metered will be liable to pay an equal share of the total amount payable for water supplied.

Some existing schemes do not have individual water meters. A number of submissions mentioned the issue of water charges as being particularly contentious. The owners of lots with large contribution schedule lot entitlements were paying more for water than other lots in the scheme and these lot owners felt this was unfair. At schemes where the contribution schedule lot entitlements were roughly equal, a one bedroom lot would pay roughly the same for water as a three bedroom lot and these lot owners felt this was unfair.

⁷⁰ BCCM Act s 196.

⁷¹ A utility service provider is defined as the supplier of a utility service to scheme land: BCCM Act Schedule 6 (definition of 'utility service provider') but for the purposes of section 196 excludes a body corporate manager, a service contract or a letting agent and their associates.

⁷² BCCM Act s 196(2)-(3).

⁷³ Queensland Plumbing and Wastewater Code Part 4. See Department of Housing and Public Works, Building Codes Queensland, 'Sub-meter guidelines' (November 2013), available at <http://www.hpw.qld.gov.au/SiteCollectionDocuments/sub-meters-guidelines.pdf>.

The best method for dealing with lot owner liability for utility services is for the liability to be apportioned based on actual usage. Where there is no practical way to measure the actual usage the only other viable alternative is for the liability to be apportioned equally among all lot owners.

While this may be less than ideal in some situations, it is the most practical solution. The total amount payable for water includes not only a variable fee for actual usage but also a fixed fee for the provision of the service, sometimes referred to as an infrastructure charge. In an ideal world, the total amount payable would be divided into three components: the fixed infrastructure charge; the variable amount of water used for the common property; and the variable amount of water used by all the lots. Lot owners would be liable for an equal proportion of the first and second components and the balance of the total would be divided among all lots based on their actual usage. Where there is no individual metering, however, it is impractical to divide the total amount of the utility charge this way. Dividing the total amount equally between all lot owners is the only way to adequately account for the infrastructure charge and the water usage for the common property.

When existing schemes transition to the new requirements,⁷⁴ the issue of liability for water usage may be a controversial issue. The Centre recognises that the approach recommended here may create an increase or decrease in the charges paid by some lot owners for water. At schemes where this Recommendation places a significant burden on lot owners or creates a significant disparity between the benefit and burden that each lot is receiving, lot owners are encouraged to investigate the possibility of retrofitting the building to provide individual meters⁷⁵ so that each lot can pay for its actual usage. It would be for the body corporate to decide if the burden of installing individual meters is outweighed by the benefit to lot owners of allocating the expense on the basis of actual usage of the utility rather than equally to all lots.

The Centre recommends consultation with water utility providers to identify possible changes to current billing practices in these situations so that the billing process can more closely approximate the actual benefit received by each lot in terms of the supply of the utility service and the burden that each lot creates in terms of the total amount payable for the supply of that service.

5.1.8. The interest schedule

8	If accepted, Recommendations 3 to 5 will place a greater emphasis on the interest schedule lot entitlement as a means of allocating expenses in a community titles scheme.
8.1	It is recommended that the interest schedule should be set based on the relative market value determined by a valuation by a registered valuer as at the date the scheme is established.
8.2	It is recommended that the valuation used by the developer to allocate interest schedule lot entitlements to each lot in the scheme should be included in the documents handed to the body corporate at the first AGM.

⁷⁴ See Recommendations 14 to 16 at 5.3 below.

⁷⁵ For example, the Gold Coast City Council has a policy on water sub-meters in community titles schemes. See <http://www.goldcoast.qld.gov.au/environment/sub-metering-7894.html>. The policy is available at http://www.goldcoast.qld.gov.au/documents/bf/Water_Sub_Metering_and_Billing_Arrangements_for_Community_Titles_Schemes_Policy.pdf.

8.3	It is recommended that the body corporate retain this information in its records.
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The market value principle requires that the interest schedule reflect the respective market values of the lots except to the extent it is just and equitable for the individual lot entitlements not to reflect the respective market value of the lots.⁷⁶ The Centre is largely supportive of retaining this requirement for setting the interest schedule. However, it is recommended that the interest schedule should reflect the value of a lot as a percentage of the total value of all lots in the scheme (**relative market value**) rather than the market value principle.

If adopted, this change from market value principle to relative market value means that there will not be any flexibility to increase or decrease the interest schedule lot entitlement of a lot to reflect just and equitable grounds. Such an adjustment will no longer be necessary as expenses will be directly allocated to categories as suggested by these Recommendations.

Some submissions suggested that the body corporate should hold information in its records that explain how costs are allocated. The Centre understands that in some cases developers rely on a quantity surveyor's report, a valuation or some other information when allocating lot entitlements.

Given the increased importance of the interest schedule in allocating expenses under these Recommendations, lot owners are entitled to know that the interest schedule has been set in accordance with the legislation. For this reason, the Centre recommends that the developer be required to obtain a valuation from a registered valuer⁷⁷ when setting the interest schedule lot entitlements for the scheme.

The valuation should be included with the other documents that are handed over by the developer to the body corporate at the first annual general meeting⁷⁸ (**AGM**). This valuation would be retained by the body corporate in its records and be available for future owners to review when considering whether to purchase a lot in the scheme and to determine whether the interest schedule lot entitlements have been allocated correctly.

While this may create additional red tape, it is arguable that many developers already produce a valuation or a quantity surveyor's report when setting lot entitlements (particularly in the case of complex schemes). It is conceivable that there may be a slight increase in the burden on developers to obtain a valuation and for it to be handed over to, and retained by, the body corporate. However this minor additional burden is more than balanced by the greater certainty that will be created for lot owners.

⁷⁶ BCCM Act s 46B(1).

⁷⁷ *Valuers Registration Act 1992* (Qld).

⁷⁸ Standard Module s 79; Accommodation Module s 77; Commercial Module s 46; Small Schemes Module s 40.

5.1.9. Obligation to exercise reasonable skill, care and diligence

9	Under the BCCM Act, developers are responsible for allocating expenses and setting the schedule of lot entitlements in new schemes. This is because developers are the best placed to allocate expenses and they have the flexibility to allocate expenses within the guidelines set by the legislation. However, there is a perception that developers may not always allocate expenses with the best interest of the body corporate in mind.
9.1	It is recommended that an obligation should be imposed on developers to exercise reasonable skill, care and diligence and to act in the best interest of the body corporate when allocating expenses into the expense categories and when setting interest schedule lot entitlements.
9.2	It is recommended that failure to discharge this obligation could result in a civil penalty.

Most submissions that responded to the question about whether developers should be responsible for setting contribution schedule lot entitlements⁷⁹ agreed that developers are the best placed to allocate expenses in a new scheme. However, many submissions argued that there should be some oversight of the developer in the form of government approval, independent certification or a monetary penalty for developers who allocate expenses negligently.

Government approval or certification would create a dramatic increase in red tape, additional cost imposts on developments and potentially cause significant delay in registering schemes. It could also create difficulty for developers to enforce off-the-plan contracts if there were changes to the structure of the scheme as a result of the certification process.

An alternative to direct approval or certification is the indirect option, such as that used in New South Wales, where developers who allocate lot entitlements unreasonably may become liable to pay the costs of owners seeking an adjustment and may also be liable for any amounts overpaid by a body corporate or owners of a lot.⁸⁰

Many individual submissions felt that developers should face some sort of penalty if they implement an allocation of expenses for a scheme designed to benefit themselves or lots retained by their associates or in a way that does not comply with the legislation. Without a monetary penalty, the only deterrent is market forces.

Currently developers have an obligation to exercise reasonable skill, care and diligence and act in the best interest of the body corporate when engaging a service contractor or a letting agent.⁸¹ Failure to discharge this obligation may result in a civil penalty of up to \$34,155 (300 penalty units at \$113.85).

In a similar vein, the Centre recommends the imposition of a new statutory obligation on developers to exercise reasonable skill, care and diligence and act in the best interests of the body corporate when

⁷⁹ Issues Paper, above n 2 at 3.8.

⁸⁰ The allocation must be unreasonable and not in accordance with the valuation of a qualified valuer: *Strata Schemes Management Act 1996* (NSW) s 183(6).

⁸¹ BCCM Act s 112(2).

allocating expenses and setting the interest schedule. This new obligation would be supported by a civil penalty and would, in most ways, mimic the obligation in BCCM Act section 112.

This obligation would be satisfied by using the valuation of a registered valuer for the interest schedule and ensuring that expenses are allocated to the appropriate categories.

5.2. Adjusting the allocation of expenses at new schemes

Over time, the types of expenses in a body corporate may change. New expenses may come up and earlier expenses may be discontinued or arise very irregularly. As new expenses arise, the body corporate will have to consider to which category the expense should be allocated.

Situations may arise where the body corporate is unable to agree to the appropriate category for a new expense, or the continued allocation of an existing expense to a particular category. In such cases, it is anticipated that the body corporate and lot owners will have access to the dispute resolution procedures in Chapter 6 of the BCCM Act. A dispute over the allocation of an expense will be like any other dispute in a scheme and the BCCM Commissioner's jurisdiction to deal with the dispute will apply.

However, some disputes regarding the expenses in the scheme may relate to the allocation of the interest schedule lot entitlements or to the operation of group use by-laws. In these circumstances, there will be appropriate mechanisms available to address the dispute.

5.2.1. Adjusting the interest schedule

10	The BCCM Act currently allows a lot owner to apply to the Queensland Civil and Administrative Tribunal (QCAT) or a specialist adjudicator to adjust the interest schedule lot entitlements.
10.1	It is recommended that, to the extent the interest schedule does not reflect the relative market value of the lots in the scheme as at the date the scheme is established, this right is retained for lot owners in new schemes.
11	<p>The BCCM Act currently provides that the interest schedule may be adjusted in a few limited circumstances. These are:</p> <ul style="list-style-type: none"> • If necessary, following a formal acquisition of part of scheme land; • By a written agreement between two or more owners to reallocate their lot entitlements amongst themselves; • Following the amalgamation of two or more lots into one lot (existing lot entitlements are added together); or • Following the subdivision of one lot into two or more lots (existing lot entitlements are allocated among the newly created lots based on the relative market value).
11.1	It is recommended that an adjustment of the interest schedule continues to be available to lot owners in new schemes in these limited circumstances.

Many submissions noted that the current controversy over lot entitlements came about largely due to adjustments of contribution schedule lot entitlements. A number of submissions argued that the lot entitlement schedules form part of the sales contract for the purchase of a lot and after the first lot in the scheme has been sold, the lot entitlements should not change.

While there was no clear consensus as to whether lot entitlements and the allocation of expenses within a scheme should be capable of adjustment, it was generally accepted in the submissions that there are specific limited circumstances where it may be necessary to adjust the allocation of expenses.

To create certainty for lot owners and the industry and to avoid the controversy that may result from a wholesale change of the allocation of expenses within a scheme, the Centre recommends that the circumstances in which interest schedule lot entitlements for the lots in the scheme may change are restricted to the few very specific circumstances as currently provided in the BCCM Act.

Currently, the interest schedule may be adjusted on application by a lot owner to a specialist adjudicator or to QCAT.⁸² An adjustment must be in accordance with the market value principle as at the date the order is made.

Recommendation 10.1 will retain this ability to adjust the interest schedule except to the extent that the adjustment must be in accordance with the relative market value of the lots as at the date the scheme is established. While this is a change from the existing principle, it creates consistency between the principles for setting and adjusting the interest schedule. Also, as Recommendation 8.1 requires a valuation when the lot entitlements are initially allocated, there should be few, if any situations where an adjustment is needed for new schemes.

Under the BCCM Act, adjustment is also available in situations where the changed allocation does not affect other lots in the scheme such as a written agreement between two or more lot owners to reallocate their lot entitlements amongst themselves⁸³ or on the subdivision⁸⁴ or amalgamation⁸⁵ of a lot.

These limitations are appropriate and should be retained as this will allow certainty and avoid a repeat of the type of controversy that ensued following adjustments of the contribution schedule prior to the 2011 Amendment.

5.2.2. Adjusting group use by-law

12	In any community titles scheme over time there may be a change of circumstances such that the existing allocation of expenses is no longer appropriate.
12.1	It is recommended that the body corporate have an ability to add to or amend the group use by-laws at the scheme to accommodate a new expense or if there is a change in the circumstances in the group of lots that are subject to the relevant group use by-law.

⁸² BCCM Act s 48.

⁸³ BCCM Act s 50.

⁸⁴ BCCM Act s 51B.

⁸⁵ BCCM Act s 51C.

12.2	It is recommended that the addition or change should require a special resolution of the body corporate and the consent of all lots that will be subject to the group use by-law.
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Legislation cannot foresee every possible circumstance that may arise at a scheme in the future. Given this, it is important that bodies corporate have the ability to adjust the allocation of expenses at the scheme if required in the circumstances.

A new expense may arise that benefits only particular lots and it may be necessary to allocate this using a group use by-law. It may become necessary to add or remove a lot from an existing group use by-law. In either of these situations, the body corporate will be able to add to or amend the group use by-laws for the scheme at a general meeting. This will require a special resolution and the consent of the owners of all of the lots subject to the group-use by-law.

5.2.3. Disputes about the allocation of expenses

13	The Recommendations provide that any expense that is not expressly category 2 or category 3 is to be treated as a category 1 expense. This may include situations where there is failure to agree as to the appropriate category to which to allocate a new expense in a community titles scheme.
13.1	It is recommended that where there is a dispute as to the appropriate allocation of a new expense, the body corporate or a lot owner may seek dispute resolution through the office of the Commissioner for Body Corporate and Community Management (BCCM Commissioner) to resolve the dispute.

Recommendation 2.2 provides that any expense that is not category 2 or category 3 will be treated as a category 1 expense. A situation may arise where the lot owners are not able to agree on the appropriate allocation of an expense. For example, a lot with a higher interest schedule lot entitlement may refuse to support the allocation of a new expense to category 2, as the lot owner would end up paying a larger share of the expense. If the body corporate is unable to agree that the expense is category 2, it may be treated as category 1. This means that all lot owners will pay equally towards the expense. This could cause a dispute where some lot owners feel that they are paying a disproportionate amount of the expense.

The Centre anticipates that any dispute between lot owners or between a lot owner and the body corporate over the allocation of an expense to a category will be caught in the existing definition of 'dispute' in the BCCM Act.⁸⁶

This means that as new expenses arise, if the body corporate cannot agree where to allocate the new expense, either a lot owner or the body corporate may seek dispute resolution through the BCCM Commissioner's office under the existing provisions of Chapter 6 of the BCCM Act.

⁸⁶ BCCM Act s 227(1)(a) for a dispute between lot owners; BCCM Act s 227(1)(b) for a dispute between the body corporate and a lot owner.

5.3. Existing schemes

The allocation of expenses in existing schemes is one of the most difficult and challenging aspects of the lot entitlement issue. The history of adjustment, reversion and cancellation of reversions of the contribution schedule lot entitlements in some schemes has made this issue contentious and emotive. As discussed above, the Centre is committed to making recommendations that will produce an allocation of expenses within community titles schemes that is fair, transparent, simple and consistent. Recommendations 1-13 outline a new approach to allocating expenses in new schemes.

To achieve consistency, the principles that apply to the allocation of expenses in new schemes should also apply to existing schemes. This may only be achieved by mandating that the requirements for new schemes (**new requirements**) also apply to existing schemes. This will mean that the same rules apply to all community titles schemes, regardless of when the scheme was established.

Of the more than 44,000 existing schemes in Queensland, nearly 83% have ten or fewer lots.⁸⁷ These schemes will generally share all expenses equally and there will be very little, if any, difference between the contributions payable by lot owners under the existing provisions as compared to contributions payable under the new requirements.

As an example, consider a six-lot scheme where all lots have equal contribution schedule and interest schedule lot entitlements. Under the current legislation, all expenses would be allocated equally among the lots. Under the new requirements, category 1 expenses, largely reflected in the administrative fund, will be divided equally. Category 2 expenses, largely reflected in the sinking fund, will be divided on the interest schedule. In this example, category 2 expenses would be allocated equally.

Some existing schemes may have a contribution schedule that is roughly equal and an interest schedule that reflects the relative market value of the lots. These schemes may end up with an allocation of expenses where all administrative budget expenses are shared equally and sinking fund budget expenses are shared on the basis of the interest schedule.

Once the transition to the new requirements is complete, there will be no further need for a contribution schedule in existing schemes. Existing schemes will not be required to change their CMS until, at some point after the transition to the new requirements, the CMS for the scheme is changed for another reason.⁸⁸

5.3.1. Transitional arrangements

14	To achieve consistency, the principles that apply to the allocation of expenses in new schemes should also apply to existing schemes. This may only be achieved by requiring existing schemes to transition to the requirements for new schemes.
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⁸⁷ Information provided by the Titles Registry as at March 2015: 44,110 total schemes: 31,045 have 6 or fewer lots and 5,457 have 7-10 lots. $((31,045 + 5,457) / 44,110 = .8275$ or nearly 83%).

⁸⁸ This may require that the Queensland Titles Registry develop an administrative process to notify people who request copies of a CMS that the contribution schedule no longer serves a purpose.

14.1	It is recommended that all existing schemes transition to the requirements for new schemes (new requirements) during a transition period of up to three years.
14.2	<p>It is recommended that the transition at existing schemes proceed in stages:</p> <ul style="list-style-type: none"> • Stage 1 will commence when the legislation enacting these Recommendations comes into effect and will last for 12 months. During this time, the body corporate will not be required to take any action, but may seek an expert report or other assistance to prepare for stages 2 and 3. • Stage 2 will require the body corporate to decide on an allocation of expenses for the scheme that complies with the new requirements. This will occur no later than the first AGM of the body corporate for the scheme that falls after the end of stage 1. The new allocation of expenses decided at this AGM will not commence until the start of the following financial year for the scheme. • Stage 3 will commence from the start of the financial year for the scheme following the adoption of the new requirements. From this time, the new requirements will apply to the existing scheme.
15	Some existing schemes may have an interest schedule that does not reflect the relative market value of the lots (e.g. schemes established under the previous Act that were deemed to be community titles schemes under the BCCM Act).
15.1	It is recommended that prior to adopting the new allocation of expenses these schemes should have the opportunity to seek a valuation from a qualified valuer to adjust the interest schedule to reflect the relative market value of the lots in the scheme as at the date the scheme was established.

Recommendation 14 provides that existing schemes will have a transition period of up to three years (depending on when the financial year for the scheme ends) before they must comply with the new requirements. The transition period will be made up of stages. At the end of three years after the Recommendations come into effect for new schemes, all existing schemes should have transitioned to the new requirements.

Stage 1 will commence from the date the legislation enacting these Recommendations comes into effect and will last for 12 months. During this time, existing schemes may voluntarily comply with the new requirements if agreement can be reached. However, the body corporate will not be required to take any action during stage 1. More complex schemes may use stage 1 to prepare for stages 2 and 3. For example, the body corporate may seek the assistance of an expert, a suitably qualified independent person with demonstrated expertise in the area, to begin to consider how to best complete stage 2 and stage 3. Body corporate managers, accountants and quantity surveyors may be suitably qualified to address the allocation of expenses for a scheme and provide a report for these purposes. The report should be prepared by a suitably qualified independent person with demonstrated expertise in the area. An expert's report is not mandatory, but it may prove very useful in allocating expenses in compliance with the new requirements. Additionally, if there are any disputes over the allocation of expenses, the expert's report may serve as evidence supporting the position advocated by the body corporate.

Stage 2 will commence from the first AGM of the body corporate for the scheme that falls after the end of stage 1. At this AGM, the body corporate will be required to adopt an allocation of expenses that complies with the new requirements. This means that in addition to adopting their budgets for the financial year and addressing any other matters, bodies corporate will be required to consider the expenses at their scheme and decide which expenses belong in each category, and if necessary, how category 3 expenses are to be allocated and what group use by-laws will be needed. Schemes that have used stage 1 to obtain an expert's report will be at an advantage in stage 2.

Stage 3 will commence from the start of the next financial year for the scheme. From the start of stage 3, the new allocation of expenses will commence and the other new requirements will apply to the scheme.

Some existing schemes have an interest schedule that does not reflect the relative market value of the lots in the scheme. This may be because the scheme was established under a previous Act or for some other reason. Where this is the case, the scheme should be able to commission a valuation from a registered valuer to determine the relative market value of the lots in the scheme at the date the scheme was established. This may be undertaken in stage 1 or during stage 2 before the AGM for the scheme. After the transition period, any adjustments to the contribution schedule will have to comply with the requirements for new schemes (as outlined in Recommendation 10).

5.3.2. Dispute resolution during the transition

16	The allocation of expenses may be a contested issue in a number of existing schemes, particularly those with a history of changes to lot entitlements. While it is anticipated that in the majority of schemes there will be minimal initial change to the amount of contributions required from each lot owner, it is recognised that not all existing schemes will be able to agree to an allocation of expenses in compliance with the new requirements.
16.1	It is recommended that if an existing scheme is unable to agree to an allocation of expenses in compliance with the new requirements during the transition period then the body corporate or a lot owner will be able to apply to the BCCM Commissioner for dispute resolution.

It is anticipated that the majority of schemes will be able to agree to a new allocation of expenses that complies with the new requirements during the transition period. At some existing schemes any dispute will likely only relate to disagreement over a small number of expenses. There will, however, be a small minority of cases where the matters in dispute involve the allocation of the interest schedule lot entitlements or other issues that make the dispute a 'complex dispute'.⁸⁹

The Centre is of the view that the existing dispute resolution process under the BCCM Act is sufficient to deal with these types of disputes for several reasons.

⁸⁹ See BCCM Act schedule 6 (definition of 'complex dispute') and BCCM Commissioner, Practice Direction 25 Complex Disputes, available at <https://publications.qld.gov.au/dataset/practice-direction-25-complex-disputes/resource/e7298c93-e725-43d7-b026-532ae37ae559>.

Firstly, such disputes are only likely to arise in a very small number of schemes. As such, there is unlikely to be a large increase in the volume of applications being made to the BCCM Commissioner.

Secondly, the BCCM Act provides that ‘complex disputes’ may be resolved by a specialist adjudicator or an order of QCAT.⁹⁰ Complex disputes include adjustments of the interest schedule. This means that disputes that involve adjustment to the interest schedule may be dealt with by a specialist adjudicator or lodged directly with QCAT.⁹¹

Thirdly, disputes that fall short of being complex for the purposes of the BCCM Act but that involve facts and circumstances (for example the nature and history of the dispute) which mean that the matter could be dealt with in a court or tribunal of competent jurisdiction, may be dismissed by the BCCM Commissioner.⁹² The BCCM Commissioner may exercise this authority if satisfied that the dispute should be dealt with in a court or tribunal of competent jurisdiction. Such a dismissal will allow the parties to pursue the matter in an alternative forum. In practice, it is anticipated that QCAT would deal with disputes arising in large and complex schemes about the allocation of expenses apart from disputes limited to responsibility for a small number of discrete, simple expenses.

Fourthly, the dispute resolution process under chapter 6 of the BCCM Act generally begins with conciliation, progressing to adjudication where a conciliated agreement cannot be reached.⁹³ This means there is a possibility that the dispute may be resolved at an early stage without the need for adjudication or further action in a tribunal or court.

Finally, the decision of an adjudicator may be appealed to QCAT on a matter of law.⁹⁴ This provides an extra layer of protection for lot owners.

If a dispute in an existing scheme relating to the allocation of expenses is heard before QCAT, the body corporate should commission (if it has not done so already) an expert report detailing and explaining an allocation of expenses that complies with the new requirements. The expert report can be submitted to QCAT for consideration when making a determination. Any lot owner in the scheme that disagrees with the report prepared by the body corporate may join the action and may provide an alternative expert report prepared at the lot owner’s own expense.

QCAT will review the report commissioned by the body corporate and any competing reports commissioned by lot owners. QCAT will have the discretion to decide on an allocation of expenses for an existing scheme that best achieves the requirements of the legislation.

This process may result in an increase in QCAT’s workload if a large number of schemes are unable to agree on the new allocation of expenses and these disputes are not able to be resolved via the BCCM Commissioner’s office. However, it is anticipated that most schemes will be able to agree on the new allocation of expenses or that they will have only a small number of expenses in dispute which means the BCCM Commissioner will be able to deal with these disputes.

⁹⁰ BCCM Act s 229(2).

⁹¹ BCCM Act s 48.

⁹² BCCM Act s 250.

⁹³ BCCM Act schedule 6 (definition of ‘dispute resolution process’).

⁹⁴ BCCM Act Chapter 6 part 11.

After the transition period, disputes about the allocation of expenses in an existing scheme will be determined in accordance with the requirements for new schemes as outlined in Recommendations 10-13.

5.3.3. After the transition period

The BCCM Act can be amended to place new requirements on existing schemes but there is no effective way to force every existing scheme to comply with the new requirements. It is not uncommon for all lot owners to be satisfied with the way things are run in a body corporate, despite the fact that the scheme is technically non-compliant with the BCCM Act. Generally, this non-compliance is only discovered when a new lot owner takes possession of a lot and realises that the body corporate is not following the letter of the law.

After the transition period, all schemes in Queensland should comply with the new requirements and allocate expenses accordingly. However, just as it is likely that there are some schemes that currently do not comply with all aspects of the BCCM Act, there may be some schemes that do not adopt the new requirements and continue to allocate expenses as they have always done. If none of the lot owners object, there is no way that the body corporate can be forced to comply with the new requirements.

If, after the transition period, it is discovered that a scheme is not complying with the new requirements, it is important that there should be no retrospectivity to the allocation of expenses. This means that lot owners will not be forced to pay additional money or be entitled to any refund for amounts that were paid due to the non-compliance with the BCCM Act. Further, once the new requirements are adopted, they should apply from the start of the next financial year for the scheme that comes after the non-compliance is discovered. This will ensure that lot owners are not suddenly faced with dramatic changes to the allocation of expenses in their scheme.

6. Conclusion

The concept of sharing expenses in a community titles scheme either equally or on the basis of the benefit received has underpinned government policy since at least 1997 and was arguably the intended outcome following amendments to the BCCM Act in 2003. These Recommendations aim to balance cost and benefit in the allocation of expenses in a way that will be sustainable for the majority of schemes.

The recommended approach does not rely on a single figure in the form of the contribution schedule lot entitlement but rather a direct analysis of each expense for the scheme. This achieves a more sustainable balance between the cost burden of a lot on the body corporate and the benefit received from the expenditure. Over the life of the scheme, changes can be agreed by lot owners to the allocation of expenses, within certain parameters, rather than needing to seek an adjustment of lot entitlements and the added expense of adjudication or court proceedings.

The complexity of the community management statement will also be reduced by the removal of the contribution schedule lot entitlements and the required explanation. The recommendations also take into account the impact of these changes on existing lots through a gradual transition period and minimal regulatory hurdles to allow the body corporate to better control the transition.